FOR ARGUMENT

Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

No. 79-305

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PETITIONER

v.

J. LEE HAVENS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

WADE H. McCREE, JR.
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Washington, D.C. 20530

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1. Respondent asserts (Br. 18-19) that the government engaged in cross-examination solely for the purpose of creating a "trivial" conflict (Br. 18 n.10) in respondent's testimony regarding the date of his conversation with DEA Agent Martinez, in order to "smuggle in" illegally seized evidence. This confuses and misdescribes the basis for the cross-examination and subsequent impeachment. The illegally seized evidence was introduced to impeach apparent serious inaccuracies in respondent's testimony given in response to legitimate cross-examination by the government.[1]

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[1]When we speak of cross-examination as being legitimate or proper, we are of course laying to one side the question to be decided in this case—whether the cross-examination (or subsequent impeachment of answers given in response thereto) is impermissible on

McLeroth testified that he had smuggled cocaine into the United States on the first trip he made with respondent to Peru by taping bags of cocaine to his body with an elastic bandage (A. 18). He further testified that respondent had sewed bags of cocaine into the altered T-shirt that he used to smuggle cocaine when he was arrested on the fourth trip (A. 27-28). After a question referring to McLeroth's testimony concerning taping or draping of cocaine around his body, respondent testified on direct examination that he did not "engage in that kind of activity with Mr. McLeroth * * * on that fourth visit to Lima, Peru" (A. 34). This testimony suggested a denial of McLeroth's testimony that respondent assisted him in secreting the cocaine in the T-shirt. Naturally, and quite properly, the government sought to explore on cross-examination whether respondent's testimony was inconsistent with McLeroth's. In response to cross-examination concerning the wrapping of bandages or T-shirts around McLeroth, respondent replied (A. 35): "I had nothing to do with anything with McLeroth in connection with this cocaine matter." The questioning later continued as follows (A. 35):

> Q. And your testimony is that you had nothing to do with the sewing of the cotton swatches to make pockets on that tee shirt?
>
> A. Absolutely not.

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account of its relationship to illegally seized evidence. Respondent apparently recognizes (Br. 16 n.8) that, apart from the fact that the T-shirts were improperly seized, there was nothing irregular or improper about the line of cross-examination pursued by the prosecutor.

These explicit denials by respondent of any participation in the preparation of the altered T-shirt for smuggling were clearly inconsistent with the likely implication of the evidence that the cut-up T-shirt used to manufacture the pockets was found in respondent's luggage. Accordingly, the government asked respondent whether such a T-shirt was found in his luggage. As the prosecutor and the trial court agreed (A. 44), the T-shirt could not be introduced into evidence if respondent admitted that the T-shirt was indeed in his luggage. Respondent, however, denied that the T-shirt was in his luggage, replying: "Not to my knowledge. No" (A. 46). The T-shirt was then introduced in connection with Agent Martinez's rebuttal testimony that the T-shirt was found in respondent's luggage (A. 50-52).

Respondent's position is that the government should not have been permitted to ask about the cut-up T-shirt, or at least that it was not entitled to a truthful answer because the question entered a "forbidden area[ ] (made forbidden by [the government's] own illegal acts) on cross-examination" (Br. 21). We disagree. When a defendant takes the stand, he is obligated to respond truthfully to proper cross-examination questions. When he does not respond truthfully, the government must be permitted to introduce evidence that impeaches his testimony, even if that evidence could not be used in its case-in-chief.[2]

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[2]Respondent suggests (Br. 20 n.12) that this rule will encourage officers to maintain files of illegally seized evidence in the expectation of using the evidence for impeachment at some future time. This rather far-fetched objection is equally pertinent if illegally seized evidence may be used only to impeach direct testimony, the rule for which respondent is arguing. In any event, this objection is without substance. Any person whose property has been illegally seized may defeat the creation of such a "file" by making a motion for the return of his property (other than contraband) under Rule 41(e) of the Federal Rules of Criminal Procedure.

2. Respondent also asserts (Br. 17-18) that his denial that the cut-up T-shirt was in his luggage when he entered the country on October 2, 1977, was not clearly inconsistent with the suppressed evidence because he testified only that he had no knowledge that the T-shirt was in his luggage until October 3, 1977, when he went to pick up his luggage on his way back to Indiana and Agent Martinez pulled the T-shirt out of the luggage (A. 47, 49). Agent Martinez, however, testified that the T-shirt was found on October 2, 1977, when the suitcase was opened in respondent's presence (A. 50-52).[3] This discrepancy between Martinez's testimony and respondent's was not "trivial" (Br. 18 n.10), but went to the heart of respondent's defense. The government was seeking to impeach respondent's denial of involvement with the pocketed T-shirt (and therefore with the cocaine smuggling) by showing that respondent possessed the cut-up T-shirt. Respondent acknowledged that he had packed his own suitcase (A. 49), but in denying that he saw the cut-up T-shirt until the day after his arrest he clearly implied, as the trial judge recognized (A. 48), that the T-shirt was placed in his luggage by the agents. The fact that the T-shirt was actually discovered in respondent's presence when the suitcase was first opened refuted this suggestion and strongly impeached respondent's denial of involvement with the pocketed T-shirt.[4]

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[3]It was this search of the contents of the suitcase on October 2 in respondent's presence that was held to be illegal (Transcript of Suppression Hearing 21, 51).

[4]Indeed, although the record is not clear as to whether the suitcase was locked, respondent testified at the suppression hearing that he himself opened the suitcase for the agents (Transcript of Suppression Hearing 51).

It is of course conceivable that respondent testified truthfully both in denying any involvement in the smuggling and in denying any knowledge of the presence of the T-shirt in his luggage when he arrived in Miami from Peru. Perhaps the agents planted it there afterwards, or perhaps, while they were packing to leave Peru, McLeroth hid it in his suitcase when he was not looking. But that is almost always true of any impeachment evidence. Impeachment is allowed so long as the evidence has a substantial tendency to contradict the witness's testimony, and it is for the jury to determine the weight to give the impeaching evidence.

Here, under ordinary evidentiary principles, respondent's testimony was clearly subject to impeachment by the evidence of the discovery of the T-shirt in his luggage. The district court so found (A. 48), and the court of appeals did not suggest otherwise. Nor do we understand respondent to deny that the impeachment would have been entirely proper but for the fact that the T-shirt was discovered in an illegal search. Under such circumstances, the government should be permitted to impeach the defendant's testimony with evidence that strongly suggests (even if it does not irrefutably prove) the falsity of that testimony. If the defendant can explain the impeachment evidence to the satisfaction of the jury, then its admission will not in the end prejudice him.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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